

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

)	
In the Matter of)	CG Docket No. 18-152
)	CG Docket No. 02-278
Rules and regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	
)	
Public Notice on Interpretation of the)	
Telephone Consumer Protection Act in)	
Light of the D.C. Circuit's ACA)	
International Decision)	
)	
and)	
)	
U.S. Chamber Institute for Legal reform,)	
<i>et al.</i> , Petition for Declaratory Ruling)	
)	

COMMENT BY JOHN HERRICK

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SUMMARY

The Commission has requested Public comment on how it should interpret the Telephone Consumer Protection Act's ("TCPA") definition of an "automated telephone dialing system" ("ATDS") in light of the D.C. Circuit's decision in *ACA International*. The TCPA protects cellular phones, as well as emergency telephone lines and hospital rooms, from all calls dialed by an ATDS without the prior express written permission of the called party. If the Commission interprets an ATDS too narrowly, it will render cellular phones vulnerable to the mass broadcasting of marketing text messages that will impair the practical functionality of consumers' cellular phones and their text message features. The Commission should not open the floodgates to allow telemarketers to use spam text messages to shift their marketing costs to the cellular phone owning public.

Petitioners urge the Commission to interpret the TCPA's definition of an ATDS to cover only devices that "generate random or sequential telephone numbers to be called." Given that random or sequential telephone number dialing machines are largely a relic of a bygone era, Petitioners' interpretation will amount to open season for telemarketers to broadcast text message ads en masse to cellular phones. Neither the plain language of the TCPA nor *ACA International* compels this dangerous result. The Commission should not adopt Petitioners' interpretation.

Instead, the Commission should interpret the TCPA's definition of an ATDS to mean "equipment which has the capacity to-- (A) store telephone numbers to be dialed *or* to produce telephone numbers to be dialed using a random or sequential

number generator; and (B) to dial such numbers.” This is consistent with the plain language of the TCPA’s definition, limits the definition to calls that are, in fact, “automatically” and not manually dialed, and, most importantly, protects consumer cellular phones from being bombarded with unwanted and unauthorized spam text messages.

I. INTRODUCTION.

Commenter¹ John Herrick is the named plaintiff in a class action alleging GoDaddy.com LLC violated the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227 (b) (1) (A), by sending promotional text messages using an Automated Telephone Dialing System (“ATDS”).² In 2015, GoDaddy contracted with a web-based software application company called 3Seventy, Inc. (“3Seventy”) to send a one-text marketing campaign to nearly 100,000 targets using the 3Seventy Platform.³ The 3Seventy platform allows a user to upload a list of numbers to target.⁴ The user can then type a desired text message and “the 3SeventyPlatform sends the message to a Short Messaging Service (‘SMS’) gateway aggregator that then transmits the message directly to the cell phone carrier.”⁵

GoDaddy’s text message marketing scheme is a paradigmatic example of the threat to consumer privacy posed by modern telecommunications marketing technology that the TCPA was designed to address.⁶ With the touch of a button,

¹ This Comment is submitted in response to the Commission’s Public Notice titled, *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit’s ACA International Decision*, CG Docket No. 18-151, CG Docket No. 02-278 (May 14, 2018) (“Public Notice”).

² *John Herrick v. GoDaddy.com, LLC*, No. CV-16-00254-PHX-DJH (D. Ariz.).

³ *Herrick v. GoDaddy.com LLC*, __ F. Supp. 3d __, 2018 WL 2229131, at *1 (D. Ariz. May 14, 2018).

⁴ *Id.*

⁵ *Id.*

⁶ H.R. Rep., 102-317, § 1 (1991) (“Many consumers are outraged [at] the proliferation of intrusive, nuisance calls.”) *See also* H.R. Rep. Telemarketing Practices: Hearing on H.R. No. 628, H.R. No. 2131, and H.R. No. 2184 before the Subcom. on Telecommunications and Finance of the House Com. on Energy and

using the 3Sventy Platform or its equivalent, a company can instantly send the same unwanted promotion to “save 40% on new products” to a hundred thousand unsuspecting, non-consenting cell phone subscribers.⁷ The only barrier that stands between this threat and consumer control over personal cell phone privacy is the TCPA’s ban on the use of an ATDS to call a cellular phone number without written permission.⁸

Petitioners⁹ now urge the Commission to define an ATDS to exclude all automated dialing systems that target lists of phone numbers that are created using a separate source and then uploaded to the automated dialing system.¹⁰ Petitioners advocate that the automated system itself must randomly or sequentially generate the numbers and call them, or it should not be considered an ATDS.¹¹

Commerce, 101st Cong., 1st Sess., p. 54 (1989) (“You get a message you didn’t want from people you don’t know on paper they didn’t buy.”) (statement of Representative Ken Jacobsen).

⁷ *Herrick, supra* note 3 at *1.

⁸ Text messaging did not exist when the TCPA was enacted, but in 2003, the Commission ruled that the TCPA’s ban on the use of an ATDS to call a cellular phone number applied to text messages as well as voice calls. *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14115 (2003).

⁹ “Petitioners” refers to the U.S. Chamber Institute for Legal Reform *et al.*, which filed this Petition for Declaratory Ruling, CG Docket No. 02-278 (May 3, 2018). “Pet.” refers to this Petition.

¹⁰ Pet., pp. ii, 24-25.

¹¹ *Id.* (“The FCC should clarify that if human intervention is required in generating the list of numbers to call ... then the equipment in use is not an ATDS”); *see also Herrick, supra*, note 3 at *8 (“Broadening the definition of an ATDS to include any equipment that merely stores or produces telephone numbers in a

But as the Commission explained in 2003, such a restrictive definition would render the phrase “ATDS” meaningless in light of modern technology:

The TCPA does not ban the use of technologies to dial telephone numbers. It merely prohibits such technologies from dialing emergency numbers, health care facilities, telephone numbers assigned to wireless services, and any other numbers for which the consumer is charged for the call. Such practices were determined to threaten public safety and inappropriately shift marketing costs from sellers to consumers. Coupled with the fact that autodialers can dial thousands of numbers in a short period of time, calls to these specified categories of numbers are particularly troublesome. Therefore, to exclude from these restrictions equipment that use predictive dialing software from the definition of “automated telephone dialing equipment” simply because it relies on a given set of numbers would lead to an unintended result. Calls to emergency numbers, health care facilities, and wireless numbers would be permissible when the dialing equipment is paired with predictive dialing software and a database of numbers, but prohibited when the equipment operates independently of such lists and software packages. We believe the purpose of the requirement that equipment have the “capacity to store or produce telephone numbers to be called” is to ensure that the prohibition on autodialed calls not be circumvented. Therefore, the Commission finds that a predictive dialer falls within the meaning and statutory definition of “automatic telephone dialing equipment” and the intent of Congress.¹²

Moreover, from the perspective of the targeted consumers and the purpose of the TCPA, the distinction between automated dialers that broadcast tens of thousands of text messages using a pre-set list, and those that internally generate the numbers randomly or sequentially, is meaningless. Indeed, under Petitioners’ definition, a company could randomly generate a list, then delete a couple numbers,

database would improperly render the limiting phrase ‘using a random or sequential number generator’ superfluous”).

¹² *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14092–93 (2003).

and, so long as it uploaded the final list to a separate system such as the 3Seventy Platform, it could indiscriminately broadcast its text message ads with impunity.

The Commission should take this opportunity to ensure that cellular phones remain free of spam text messages sent without “prior express written consent.”¹³ To the extent that businesses actually need to “send time critical communications to their customers and members promptly and efficiently,” requiring permission will not impose an undue burden on businesses.¹⁴ Moreover, businesses have other means that are less intrusive for consumers, such as email, to achieve the same purpose. Further, as the *Herrick* case illustrates, Petitioner’s proposed definition of “ATDS” would open the floodgates for a spam text plague. The Commission should reaffirm that an ATDS includes any automated system that is used to autodial a list of numbers regardless of whether the list is generated in advance and uploaded to the system or, alternatively, generated by the system itself.¹⁵

II. ARGUMENT.

A. The purpose of the TCPA is to protect consumers from the use of “automated” or “computerized” systems to make calls without prior permission.

Shortly before its passage in the Senate, the sponsor of the TCPA explained its purpose to ban “computerized calls” as follows:

¹³ 47 C.F.R. 64.1200 (a) (2).

¹⁴ Pet., p. 11.

¹⁵ *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. at 14092–93.

Mr. President, I rise today to urge the Senate to approve S. 1462, the Automated Telephone Consumer Protection Act. The substitute amendment before the Senate addresses an enormous public nuisance. Computerized telephone calls are invading our homes and destroying our privacy. Consumers around the country are crying out for Congress to put a stop to these computerized telephone calls. Congress has a clear opportunity to protect the interests of our citizens, and we should not pass up this chance. Computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall.

...

These machines are out of control, and their use is growing by 30 percent every year. It is telephone terrorism, and it has got to stop.

...

The telemarketing industry appears oblivious to the harm it is creating. Two months ago, a representative of the Direct Marketing Association said on television that telemarketers have a right to call us in our homes. This is absurd. I echo Supreme Court Justice Louis Brandeis, who wrote 100 years ago that “the right to be left alone is the most comprehensive of rights and the one most valued by civilized man.”¹⁶

Earlier, when Congress enacted the TCPA, it included Findings expressing similar sentiments and expressions of its purpose to ban all automated calls:

(10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.

(11) Technologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer.

(12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the

¹⁶ 137 Cong. Rec. S16204-01 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings); *see also* S. Rep. 102-178 (1991) (“The bill would accomplish the following: ... ban all computerized calls to the home, unless the called party consents to receiving them...”).

health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

(13) While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

(14) Businesses also have complained to the Congress and the Federal Communications Commission that automated or prerecorded telephone calls are a nuisance, are an invasion of privacy, and interfere with interstate commerce.

(15) The Federal Communications Commission should consider adopting reasonable restrictions on automated or prerecorded calls to businesses as well as to the home, consistent with the constitutional protections of free speech.¹⁷

These expressions of purpose and intent show that a core purpose of the TCPA was stop the use of “computerized” or “automated” telecommunications equipment to call phone numbers without permission. While text messaging did not yet exist in 1991, the nature of text message technology makes it particularly vulnerable to the exact same abuses that the TCPA was aimed at preventing because cellular telephones automatically accept and record text messages when they are received. Indeed, the House report stated, “Automatic dialing systems (automatic telephone dialers coupled with recorded message players) ensure that company’s message gets to potential customers in the exact same way, every time, without incurring the normal cost of human intervention.”¹⁸

¹⁷ Telephone Consumer Protection Act of 1991, Pub. L. 102–243, § 2, 105 Stat. 2394 (1991).

¹⁸ H.R. Rep. 102-317 (1991).

This is also exactly how automated test messaging works, and why it poses such a danger to consumer privacy. Furthermore, cellular phones have become a ubiquitous and primary means of personal communications that people carry with them at virtually all times. As such, Senator Hollings observation, “Computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall,” applies with equal force to the current vulnerability of cellular telephones to spam text messages.

The TCPA’s statutory definition of an “ATDS” has not changed since 1991. As the express congressional findings set forth in the Act itself attest, the danger it aimed to address was the use of “automated” calls without consent.¹⁹ Or, as Senator Hollings described them, “computerized” calls. Contrary to Petitioners’ arguments, the danger that the TCPA was aimed at stopping has nothing to do with how a list of phone numbers might be generated and everything to do with whether those numbers are dialed using a “computerized” system to “automatically” call them without permission “in the exact same way, every time, without incurring the normal cost of human intervention.”

B. The TCPA bans all automatically dialed, unsolicited calls to cellular phones.

Since its enactment in 1991, the TCPA has banned automated calls to cellular phones without prior express permission:

It shall be unlawful for any person ...

¹⁹ Telephone Consumer Protection Act of 1991, *supra*, note 17 at § 2.

(A) to make any call (other than a call made for emergency purposes or made with prior express consent of the called party) using any automatic dialing system or an artificial prerecorded voice –

(i) to any emergency telephone line (including any “911” line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, healthcare facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.²⁰

As the above shows, Congress grouped cellular phones, hospital rooms and emergency lines in the same category. If the Commission and courts interpret ATDS narrowly to allow unsolicited calls to cellular phones, they will also be authorizing such calls to hospital patients and emergency telephone services.²¹

The TCPA was enacted before text messaging existed, but the Commission has interpreted the word “call” to include text messages.²² The Ninth Circuit in

²⁰ 47 U.S.C. § 227 (b) (1).

²¹ Petitioners might argue that using a list as opposed to a random or sequential number generator allows the sender to avoid some of the categories of subscribers set forth in section (b) (1), but if an ATDS is defined so that it does not cover automatic dialing of numbers from a pre-selected list, there would be no TCPA restrictions on targeting *both* patient rooms and cellular phones using such a list. Neither the TCPA nor the Commission’s regulations promulgated thereunder have approached the effectuation of statutory and regulatory prohibition through the rubric of voluntary self-limitation by commercial telemarketers.

²² *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 F.C.C. Rcd. 14014, 14115 (July 3, 2003). The 2003 regulation also clarified

Satterfield gave three reasons for holding the Commission’s view was reasonable and should be followed. First, the TCPA does not define “call.”²³ Second, text messages did not exist in 1991, so Congress could not have spoken clearly to the issue when it enacted the TCPA.²⁴ And finally, the purpose of the TCPA is to “protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home,” and this purpose is furthered by restricting unwanted text messages.²⁵

In 2012, the Commission promulgated a regulation that required prior express “written” permission to make automated “telemarketing” calls to cellular telephone numbers.²⁶ The Commission’s purpose was to harmonize its rules with the Federal Trade Commission’s telemarketing rules, and this change had widespread support from both consumers and businesses.²⁷ Under the current regime, a caller needs express permission to make any automated call to a cellular phone number and express *written* permission to make an automated telemarketing call, but no permission is required to make a call if the caller does not use an ATDS. An unduly narrow definition of ATDS would unavoidably and broadly

that the “do-not-call list” provisions applied to wireless subscribers. 18 F.C.C. Rcd. 14014 at 14039 (codified at 47 C.F.R. § 64.1200 (e)).

²³ 569 F.3d at 954.

²⁴ *Id.*

²⁵ *Id.* (quoting S. Rep. No. 102-178, 1 (1991)).

²⁶ *Telephone Consumer Protection Act of 1991*, 77 Fed. Reg. 34233-01, 34234-35 (June 11, 2012) (codified at 47 C.F.R. § 64.1200 (a) (2)).

²⁷ *Id.*

eviscerate the fundamental purpose and protections intended by both Congress and the Commission.

C. The TCPA’s definition of an ATDS should be construed to cover any device that automatically dials a list of stored numbers en masse.

The TCPA defines “automated” calls as follows:

As used in this section—

(1) the term “automatic telephone dialing system” means equipment which has the capacity—

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.²⁸

This definition has not changed since the TCPA was first enacted in 1991. And although this definition of an ATDS is not a model of clarity, by analyzing the language carefully, it can be seen that the only coherent and consistent meaning it can convey is that the definition covers any device that automatically dials a stored list of numbers *or* automatically dials random or sequentially generated numbers.

First, the phrase being defined—“automated telephone dialing system”—must be kept in mind when reading the rest of the definition. As Senator Hollings emphasized, Congress’s aim was directed at “computerized” calls. *Automation* was the key feature that Congress sought to curb because *that* is what makes mass telemarketing so cheap and attractive that it would otherwise be a serious nuisance.

Second, subsection (A) must be construed with careful and dutiful attention to the disjunctive “or” and the verb phrases “capacity to” “store,” “produce,” and

²⁸ 47 U.S.C. § 227 (a).

“call[].” The object of these verbs is clearly “telephone numbers to be called.” Subsection (A) then adds, after a final comma, the phrase “using a random or sequential number generator.” This final phrase cannot logically modify the verb “store” because a random or sequential number generator does not “store” numbers, it only generates them. In other words, as long as the device can store numbers to be called, such as through accepting and using a provided list, it is an ATDS.

In fact, the legislative history shows that Congress understood in 1991 that such a “generator” was not used to “store” telephone numbers but to actually dial them as generated.²⁹ This shows the significance of the word “or” in subsection (A). The phrase “using a random or sequential number generator” can only be logically applied to the verb “produce.” A generator “produces” numbers but does not “store” them. Put another way, subsection (A) requires that the “automated telephone dialing system” have the “capacity to” either (1) “store ... telephone numbers to be called,” or (2) “produce telephone numbers to be called, using a random or sequential number generator.” This reading makes sense because subsection (A) states “store *or* produce telephone numbers to be called.”

Confusion arises because the phrase “telephone numbers to be called” is the object of both verbs “store” and “produce”, but the modifying phrase “using a random or sequential number generator” modifies only the verb “produce.” Another way to understand this is to read subsection (A) as follows: “the capacity ... to store [telephone numbers to be called] or produce telephone numbers to be called, using a

²⁹ H.R. Rep. 102-317, *supra*, note 17.

random or sequential number generator.” This does not re-write the subsection because there can be no doubt that phrase “telephone numbers to be called” is, in fact, the object of the verb “store.” Thus repeating the object of both verbs simply clarifies that the phrase “using a random or sequential number generator” can only logically modify the verb “produce” even if there is syntactical ambiguity caused by its location at the end of the phrase.

Finally, leaving aside logic and grammar, the proper construction of the TCPA’s definition of an “automated dialing system” must preserve its original purpose to cover all “computerized” or “automated” calls. Indeed, *ACA International* itself acknowledges, “So which is it: does a device qualify as an ATDS only if it can generate random or sequential numbers or can it even if it lacks that capacity? ... It may be possible for the Commission to adopt either interpretation.”³⁰

Petitioners argue that the phrase “using a random or sequential number generator” limits the entire definition.³¹ The district court in *Herrick* similarly concluded that any contrary construction would render the phrase “superfluous.”³² Both are wrong. If Congress had intended to only bar unsolicited calls to cell phones “using a random or sequential number generator,” that is how 47 U.S.C. § 227 (b) (1) (A) would read. There would have been no reason for the subsection to refer to “automated telephone dialing systems,” or provide a definition of them. In fact, the construction advocated by Petitioners and adopted in *Herrick* renders everything

³⁰ 885 F.3d at 703.

³¹ Pet., p. 21.

³² *Herrick*, *supra*, note 3 at *8.

except the phrase “using a random or sequential number generator” superfluous. “[S]tatutes should be read to avoid making any provision ‘superfluous, void, or insignificant.’” *Milner v. Department of Navy*, 562 U.S. 562, 576 (2011), *quoting TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

More importantly, it is not at all illogical or strange to conclude that Congress intended to ban unsolicited calls to cellular phones or to “patient room[s] in a hospital” if they were made by automated systems using either blocks of stored numbers *or* randomly or sequentially generated numbers. To the contrary, this is only the construction consistent with the TCPA’s express legislative purpose.³³

- D. By focusing on “automatic dialing” as the operative feature of an ATDS, the Commission can address the issues raised by *ACA International* and craft an interpretation of the TCPA’s definition that will preserve the purpose of the TCPA to protect consumers from unwanted calls sent en masse to cellular phones.**

The Commission’s Public Notice identifies three issues relating to the definition of an ATDS: first, the meaning of the word “capacity” and whether “capacity” should be construed to refer to present ability or potential ability; second, whether the device’s functions must include dialing without “human intervention,” and whether the device must generate random or sequential numbers when doing so; and third, whether the equipment must be used as an ATDS in actually making the call at issue. All three questions can be readily answered by bearing in mind the analysis of the language set forth in section “C,” above, and in light of the purpose of the TCPA.

³³ 47 U.S.C. § 227 (b) (1) (A) (ii).

The purpose of the TCPA is, and always has been, to prevent “automatic” or “computerized” calls where the caller can send a message to thousands of targets at once with minimal cost to itself by using modern technology. In *Herrick*, GoDaddy’s use of the 3Seventy platform to blast the same “40% off” promotion to nearly a 100,000 cell phone numbers is a quintessential example of the problem. At its core, GoDaddy’s mass text blast threatens consumer privacy because it is a very inexpensive way for GoDaddy to occupy the cell phones of the targets and shift the costs of a marketing program on to those targets.

Turning to Congress’s definition of an “ATDS” and the three issues raised by the Commission’s Public Notice:

First, the plain meaning of “capacity” does not unambiguously refer to future ability.³⁴ Moreover, “capacity” can be construed to refer to the present ability of the equipment without compromising the purpose of the TCPA. The purpose of the TCPA’s ban on unsolicited ATDS calls is to stop “automated” or “computerized” calls, which is to be contrasted against manually dialed calls.³⁵ This purpose would not be furthered by construing “capacity” broadly to cover manually dialed calls simply because they were placed from a device that could be modified to do “automated” calls. This obviates the need to split hairs over “how much user effort

³⁴ See I Webster’s Third New Int’l Dictionary, 330 (Philip P. Gove, *et al.*, eds., Merriam-Webster 1986)

³⁵ Telephone Consumer Protection Act of 1991, *supra*, note 17 at, § 2.

should be required to enable the device to function as an automatic telephone dialing system.”³⁶

Second, the Commission can find that an ATDS must “dial numbers without human intervention” while preserving the purpose of the TCPA and staying within the plain meaning of the text. The word “automated” means that the device must dial individual numbers without conscious human intervention *in the dialing process itself*. The Commission should reject Petitioners’ argument that human intervention in *the generation of a list of numbers*, as opposed to *the dialing of those same numbers*, can remove a device from the definition of an ATDS.³⁷ As discussed above, the statute’s purpose is served by a definition of ATDS that includes devices that can automatically mass broadcast text messages, regardless of whether the targets are selected by the machine or by the company that wields it.

As explained above, the purpose of the TCPA and its ban on ATDS calls to cell phones and hospital rooms would be defeated if a telemarketer could avoid the ban simply by generating lists of hundreds of thousands of numbers to be uploaded to a platform like 3Seventy. Petitioners’ proposed formulation is not only contrary to the purpose of the TCPA, it is also contrary to the plain language of the TCPA’s definition of an ATDS. An ATDS is an “automated telephone *dialing* system.” Dialing is the operative word, not number generation. As explained above in section “B”, if the phrase “using a random or sequential number generator” is construed to modify the word “store,” it renders all of the other language in the definition

³⁶ Public Notice, p. 2.

³⁷ Pet., pp. ii, 24-25.

including the phrase “automated telephone dialing system” meaningless. Under Petitioners’ formulation, an ATDS would be defined as a “random or sequential number generator,” and *only* a “random or sequential number generator.” That is not what Congress said or intended. The Commission should, therefore, reiterate its human intervention test, but consistent with the D.C. Circuit’s admonition, clarify that it applies to the *dialing* of telephone numbers, not the *generation of a list* to be automatically dialed.

Third, The Commission should find that a call must be made “using the equipment’s [automatic telephone dialing system] functionality.”³⁸ As explained above, the purpose of the TCPA’s ATDS calling ban is to prevent companies from involuntarily shifting the costs of their mass calls onto cellular phone users who have not provided prior express written permission. This purpose is not furthered when a call is manually dialed, regardless of what equipment is used, because the cost of manual dialing equalizes the burdens and levels the playing field.

III. CONCLUSION.

The Commission should find that an ATDS means equipment that has the capacity to (A) store telephone numbers to be dialed *or* to produce telephone numbers to be dialed using a random or sequential number generator; and (B) to dial such numbers. This definition is consistent with the plain language of the TCPA and addresses the issues raised by the *ACA International* decision while preserving the core purpose of the TCPA’s ban on calls that are automatically dialed

³⁸ Public Notice, p. 3.

en masse to thousands of cellular phone numbers with little cost to the caller and at great nuisance and harm to the targets.